No. G045730

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FOURTH APPELLATE DISTRICT
DIVISION THREE

---

COSTA MESA CITY EMPLOYEES' ASSOCIATION,

*Respondent-Plaintiff,*

v.

CITY OF COSTA MESA and THOMAS HATCH,
Chief Executive Officer for the City of Costa Mesa,

*Appellants-Defendants.*

---

On Appeal Orange County Superior Court
Case No. 30-2011-00475281
Honorable Tam Nomoto Schumann, Judge

---

# RESPONDENT'S BRIEF

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**TO BE FILED IN THE COURT OF APPEAL**

**APP-008**

| COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE | Court of Appeal Case Number: G045730 |
|---|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Gregg McLean Adam #203436; Jonathan Yank #215495; Gonzalo C Martinez #231724 CARROLL, BURDICK & McDONOUGH LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104 TELEPHONE NO.: 415.989.5900 FAX NO. (Optional): 415.989.0932 E-MAIL ADDRESS (Optional): jyank@cbmlaw.com ATTORNEY FOR (Name): Respondent Costa Mesa City Employees' Association | Superior Court Case Number: 30-2011-00475281 |
| | FOR COURT USE ONLY |
| APPELLANT/PETITIONER: CITY OF COSTA MESA, et al. | |
| RESPONDENT/REAL PARTY IN INTEREST: COSTA MESA CEA | |
| **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS** (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE | |

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1. This form is being submitted on behalf of the following party (*name*): Costa Mesa City Employees' Association

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

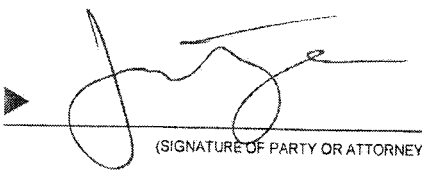
| Full name of interested entity or person | Nature of interest (*Explain*): |
|---|---|
| (1) Orange County Employees' Assoc. | Provides labor relations services for Respondent-Plaintiff Costa Mesa City Employees' Association |
| (2) | |
| (3) | |
| (4) | |
| (5) | |

☐ Continued on attachment 2.

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: February 23, 2012

Jonathan Yank
(TYPE OR PRINT NAME)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# I

## INTRODUCTION

The Opening Brief of the City of Costa Mesa and Thomas Hatch (collectively the "City") emphasizes the trial court's purported error in issuing a *preliminary* injunction enjoining it from (1) contracting with private entities to outsource city jobs and (2) firing more than half of its employees based on that outsourcing in September/October 2011. Yet, even though it asks this Court to reverse that injunction, it offered no meaningful showing or argument that it suffered ***any*** injury when the injunction was entered or that it does so even now, particularly in light of the fact that the case will be tried on the merits in approximately six weeks, beginning April 9, 2012.

By contrast, the trial court correctly found, based on the record before it, that City employees would suffer irreparable harm without a preliminary injunction because the City issued over 100 termination notices to them informing them they would be fired on a date certain because the City "decided to contract [out]" their jobs. (JA 95, 174.) The trial court did not abuse its discretion by preserving the *status quo* while it determined whether the City even had the authority to outsource that it claimed.

Armed with newly-minted arguments, the City invites this Court to second-guess the trial court. The City, inexplicably ignoring the termination notices, argues that the injunction should be lifted because city

employees allegedly were not threatened with any impending harm. It further argues that the injunction was improper because it purportedly has unbridled authority under the state Constitution, the Government Code, and even the parties' Memorandum of Understanding ("MOU") to outsource city jobs to private entities, and, thus, that Respondent is unlikely to succeed on its claims. None of those arguments has any merit.

First, as outlined above and below, the termination notices unequivocally told employees they would be fired. Second, under bedrock principles of California law, general law cities only have those powers expressly granted to them by the Legislature, and the City can point to no statute that gives it the authority it asserts here. Third, a contractual agreement such as an MOU cannot give the City authority the Legislature denied to it, even if the MOU's terms did what the City declares (and they do not).

Moreover, the City artfully conflates the full analysis required on the merits of Respondent's claims with that necessary for a preliminary injunction, which, by necessity, is more limited. (See *Butt v. State of California* (1992) 4 Cal.4th 668, 678 n.8 ["the propriety of preliminary relief turns upon difficult estimates and predictions from a record which is necessarily truncated and incomplete"].) Regardless, the trial court did not abuse its discretion and this Court should affirm.

## II

## SUMMARY OF RELEVANT FACTS AND PROCEDURAL HISTORY[1]

Respondent Costa Mesa City Employees' Association ("CMCEA") is a recognized employee association representing approximately 200 employees working in various departments within the City of Costa Mesa. (JA 1-2.) Costa Mesa is a general law city. (JA 2.)

CMCEA and the City entered into an MOU governing the terms and conditions of employment for CMCEA members, which expires in March of 2013. (JA 6.) The MOU prevents the City from unilaterally altering the terms and conditions of employment (JA 100 [Section 1.5]), limits the ability of the City to outsource city jobs to "specific services" (JA 121 [Sections 14.1, 14.2]), and requires the City to give any employee who would be terminated due to any such outsourcing six months of notice (JA 122 [Section 19.2(B)].)

CMCEA filed the underlying suit and sought a preliminary injunction in the trial court when the City issued termination notices to

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[1] Although the City frames the facts discussed in its Opening Brief as CMCEA's "allegations" (e.g., at pp. 4, 6), the trial court's orders are presumed correct and entitled to all inferences necessary to support them. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 ["A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown"] [internal citations and quotations omitted; italics in original].)

more than half of CMCEA's members. (JA 76-89; AOB at p. 15 [56% of CMCEA members received termination notices].)

### A. The City Issued Layoff Notices Because It Had "Decided" to Outsource City Jobs

In March of 2011, the City issued two rounds of termination notices to 110 City employees. (See JA 95, 174.) Those notices informed employees that:

- "At its March 1st 2011, meeting the City Council ***decided to contract*** 18 identified City services." (*Id.* [emphasis added].)
- "This decision triggers the notice provisions" of Administrative Regulation 2.26. (*Id.*)
- "In order to adhere to the . . . Council's direction, it is necessary to issue this layoff notice to every affected employee in a position subject to outsourcing." (*Id.*)
- "[Y]our position is subject to this outsourcing of City services." (*Id.* [detailing layoff procedures].)
- "You are hereby notified that you will be subject to lay off effective . . . September 17, 2011 [or October 8, 2011]." (*Id.*)
- "Employees . . . who will be laid off, should work closely with the Human Resources Division on questions, continuance of health benefits, retirement options and explanation of . . . unemployment insurance benefits." (*Id.*)
- "I sincerely regret that the City's current conditions require that City employees be laid off." (JA 96, 175.)

Although the notices state that they are "subject to being rescinded pending [sic] City Council's future action on this matter" (JA 95, 174), the trial court found these termination notices were "a significant step

in the ordering of outsourcing of the city employee services" (JA 532:8-9 [Reporter's Transcript]) because "these letters . . . indicate[] . . . that people [are] going to be laid off at a ***certain*** date and time." (JA 537:7-9 [emphases added].)

The services the City intended to outsource were and are performed by CMCEA members and include: street sweeping, graffiti abatement, park maintenance, parkway and median maintenance, fleet maintenance, street maintenance, facility maintenance, animal control, city jail, special event safety, information technology, telecommunications, building inspection, reprographics, graphic design, payroll, and employee benefit administration. (JA 3 ¶ 8 [verified complaint]; JA 92, 232-233, 250-251, 270-271, 323-324, 344-345, 386-387, 417-418 [employee declarations attesting that jobs to be outsourced listed in draft requests for proposals are not "special services" and currently performed by city employees].) The City did not claim or present evidence these were "special services" within the meaning of Government Code sections 37103 and 53060.

### B. The Trial Court Issued the Preliminary Injunction to Maintain the *Status Quo* Because City Employees Were to Be Terminated on September 17 or October 8, 2011

The certainty of the September 17 and October 8, 2011 termination dates in the City's letters was an important factor in the trial court's decision to issue the preliminary injunction. It stated that "[t]he

most compelling factor in this case is that an order . . . will most likely maintain the *status quo* pending the outcome of the action" (JA 532:16-18), because it found "there does not appear to be any way to undue [sic] the harm" to terminated employees. (JA 532:20-21 [trial judge reading tentative decision into record]; see also JA 537:6-9 [finding plaintiffs' "concern arose from these letters . . . that indicated . . . that people were going to be laid off at a certain date and time"].) Based on the record before it, the trial court found that enjoining the ultimate act of entering into contracts to outsource city jobs "would specifically enforce the current law and prevent any premature action by the City," i.e., terminating its employees. (JA 532:24-26.)

### C. The Preliminary Injunction Only Enjoins the Ultimate Acts of Contracting With Private Companies and Terminating Employees as a Result of Such Contracting

The City vaguely argued that an injunction would unlawfully "restrain[] the City from thinking about outsourcing potential jobs." (JA 533:26 – 534:1; see also JA 533:22-24 ["The City is in a thought process of outsourcing – potentially outsourcing several areas of city employment"].) The trial court rejected that argument because "as far as the City's ability to explore other avenues of . . . fiscal soundness, I do not think that this injunction extends to preventing the City from doing that as long as they do

not terminate folks without following the proper procedures." (JA 537:10-14.)

Accordingly, the trial court entered a preliminary injunction on July 15, 2011. (JA 585-586.) The preliminary injunction provides, in relevant part, as follows:

> It is hereby ordered that *during the pendency of the above-entitled action* or until further Court order, the Defendants . . . are hereby enjoined and restrained from: 1.) ***contracting out*** to any entity which is not a 'Local Agency' [under] Government Code Section 54980 for services currently performed by City of Costa Mesa employees . . . and; 2.) ***laying off City of Costa Mesa employees*** . . . as the result of [such] contracting . . . .

(See *id.* [emphases added].)

### D. The City Eventually Filed This Appeal

The City did not ask the trial court to stay the preliminary injunction. Nor did it file an immediate appeal, as allowed by Code of Civil Procedure section 904.1, subd. (a)(6). Rather, the City waited five weeks before filing an improper[2] petition for writ of mandate. (See *City of Costa Mesa v. Sup. Ct.*, Case No. G045666.) This Court summarily denied the City's petition. (*Id.*)

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[2] "Generally, a judgment that is immediately appealable is not subject to review by mandate or other extraordinary writ." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 112.)

One week later, the City filed this appeal. It has never asked this Court to stay the trial court's preliminary injunction by filing a petition for writ of supersedeas or a motion to stay.

## III

## STANDARD OF REVIEW

Appellate review of a preliminary injunction "is limited to whether the trial court's decision was an abuse of discretion." (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.) Any "party challenging the superior court's order has the burden of making a *clear showing* of such an abuse." (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 739 [emphasis added].)

A preliminary injunction is properly granted where, as here, the trial court finds that: (1) in the *interim* before full adjudication on the merits, "the plaintiffs are likely to suffer greater injury from a denial of the injunction than the defendants are likely to suffer from its grant" and (2) "there is a *reasonable* probability that the plaintiffs will prevail on the merits." (*Robbins v. Sup. Ct.* (1985) 38 Cal.3d 199, 206 [italics added, citations omitted]; *Butt, supra,* 4 Cal.4th at pp. 677-678 [court looks at "interim harm"].) Those two questions are "interrelated," meaning that "[t]he trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt, supra,*

4 Cal.4th at pp. 677-678; *Robbins*, 38 Cal.3d at p. 205 [trial court "must exercise its discretion 'in favor of the party most likely to be injured'"].)

The City claims that *de novo* review applies here. (AOB at pp. 7, 18.) That is incorrect. To be sure, statutory construction and other ***pure*** questions of law may be subject to *de novo* review. (*Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 780 [*de novo* review appropriate when "[t]here are no relevant evidentiary disputes and the determination of the trial court did not require an exercise of discretion"].) But where the trial court granted the preliminary injunction based on its balance of the two "interrelated" factors for injunctive relief, this Court's review is for abuse of discretion. (*Butt, supra,* 4 Cal.4th at 677-678.)

In fact, our Supreme Court has held that a preliminary injunction should be "affirmed if *either* the balance-of-hardships analysis ***or*** plaintiffs' likelihood of success considerations would *alone* support the ruling." (*King v. Meese* (1987) 43 Cal.3d 1217, 1227 [emphases added]; accord *Robbins, supra,* 38 Cal.3d at p. 205 ["[i]f the denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it

were granted, then it is an abuse of discretion to fail to grant the preliminary injunction"].)[3]

## IV

## THE CITY FAILS TO SHOW IT WAS "CLEAR ERROR" FOR THE TRIAL COURT TO FIND THAT CMCEA MEMBERS WOULD HAVE BEEN IRREPARABLY HARMED BY THE IMMINENT TERMINATION

### A. The Trial Court Correctly Found That a Preliminary Injunction Was Warranted Based on the Certainty of the Termination Dates

The City charges that the trial court erred in finding imminent irreparable harm. But as the City's own cases confirm, "[t]o qualify for preliminary injunctive relief plaintiffs must show irreparable injury, either *existing* or *threatened*." (*City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 526 [italics added], cited at AOB p. 8.) The trial court correctly found imminent threatened harm based on the facts before it.

The primary reason the trial court granted the preliminary injunction was because the City had issued over 100 termination notices to employees informing them they would be laid off on a date certain, and it found that any ensuing harm to employees arising from their termination

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[3] The City represents that "Counsel for CMCEA agrees" that *de novo* review applies here, citing a five-year old appellate brief filed by co-counsel in a *different* case involving *different* parties. (AOB at pp. 18, 37.) Needless to say, CMCEA's position is that abuse of discretion is the proper standard of review under the circumstances of this case.

could not be undone. (See JA 532:16-18, 532:20-21, 537:6-9 [reporter's transcript].) Indeed, the City's termination notices clearly told employees that the City had "decided" to outsource their job and directed them to contact the human resources department regarding "unemployment insurance benefits." (JA 95, 174 [termination notices].) By contrast, the trial court found that the City showed *no harm*, much less immediate or irreparable harm, arising from the injunction. (JA 533:9-13, 537:20-21.)

With this record before it, the trial court did not abuse its discretion by preserving the *status quo* while it ultimately determined whether the City even had the authority it claimed to outsource city jobs. (*King, supra,* 43 Cal.3d at p. 1227 ["the more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. This is especially true when the requested injunction maintains, rather than alters, the status quo"].) Moreover, given the presumption *against* a general law city's exercise of powers not *affirmatively* granted by a statute, the court did not err. (See *Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13, 20-21 ["The powers of such a city are strictly construed, so that 'any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation'"].)

The City inexplicably glosses over these termination notices to make several unpersuasive arguments. First, it insists the harm employees faced was "speculative" because "[t]here is *no evidence* the [the City] has

decided to contract out any particular service or even scheduled such a determination." (AOB at p. 9 [italics added].) That is flatly incorrect. The termination notices unequivocally state on their face that, "[a]t its March 1st 2011, meeting the City Council ***decided to contract 18 identified*** City services," that "your position is subject to this outsourcing of City services," and that "[y]ou are hereby notified that you will be subject to lay off effective . . . September 17, 2011 [or October 8, 2011]." (JA 95, 174 [emphases added].) The termination notices thus directly targeted city employees who provided the identified city services. (*Id.*) Additionally, CMCEA presented the trial court with draft requests for proposals ("RFPs") for services currently performed by city employees. (See JA 235-248, 253-268, 273-321, 326-342, 347-384, 389-412, 420-462.)

There is no ambiguity or uncertainty, and the trial court did not abuse its discretion in taking the City at its word that it intended to terminate employees who received these notices unless it affirmatively decided otherwise. (*Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084 [a preliminary injunction "must be supported by actual evidence that there is a *realistic* prospect that the party enjoined *intends* to engage in the prohibited activity"], italics added.)

In fact, other courts have found the irreparable harm requirement established by lesser financial depravations than outright job loss. (See,

e.g., *Barajas v. City of Anaheim* (1993) 15 Cal.App.4th 1808, 1813 [ordinance prohibiting food trucks in residential areas, which plaintiffs contended would destroy their livelihoods, would cause irreparable injury justifying preliminary injunction]; *Butt, supra,* 4 Cal.4th at pp. 692-693 [upholding injunction preventing early closure of schools and relying in part on evidence that low income families would have to arrange for expensive child care]; *Social Services Union, SEIU Local 535 v. County of San Diego* (1984) 158 Cal.App.3d 1126, 1131 [denying payment of two paid holidays as required by lower court's writ of mandate would have caused "irreparable damage to the employees"].)

Next, the City makes two related arguments second-guessing the timing of the preliminary injunction. The City argues the trial court should have waited until the City had ratified a contract with a private party before granting injunctive relief. (AOB at pp. 9-10.) But given the certainty of the termination notices and the impending mass lay off of city employees, Respondents were "not required to wait until they have suffered actual harm before they apply for an injunction, but may seek injunctive relief against the threatened infringement of their rights." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1292; *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.* (1991) 230 Cal.App.3d 207, 223 ("*SCLC*")

[same].) That is especially true when the City has no authority to outsource city jobs to private contractors.[4]

The same is true for the City's argument that CMCEA "should return to court when the threat of layoffs are impending," i.e., "[t]hirty days" before layoffs. (AOB at p. 10.) But the termination notices themselves made clear the layoffs were "impending" enough to trigger the notice provisions in: (1) Administrative Regulation 2.26—which only applies "[i]n the event *a decision is made by the City to contract out* for a specific service performed by City employees"; and (2) MOU section 14.2—which applies only "*should a decision be made to contract out.*" (JA 95, 174 [quoting Administration Regulation 2.26]; JA 121 [MOU] [emphases added].) And the City essentially concedes the notices were sent to comply with these requirements. (See, e.g., AOB at p. 14; JA 170-171 ¶¶ 3-5 [Hatch Decl.].)

Finally, the City argues for the first time that the preliminary injunction improperly "halt[ed] the legislative process" and that injunctions preventing legislative acts are "prohibited." (AOB at p. 10, citing Code

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[4] The City's argument that injunctive relief should wait until there is a ratified contract also fails because it would be impractical. That would unnecessarily involve third parties in the dispute, because CMCEA would be forced to seek invalidation of any such contract. From a judicial economy and practical perspective, it is preferable for all parties involved to know whether such a contract is permissible *before* the City enters into it. And that is the subject of the underlying litigation in this case.

Civ. Proc., section 526(b)(7).) The City forfeited this argument by failing to raise it in the trial court. (*JRS Products, Inc. v. Matsushita Elec. Corp. of America* (2004) 115 Cal.App.4th 168, 178.)[5] Regardless, that overbroad argument has no merit.

First, the injunction here does not preclude the City from lawfully exercising its authority by, e.g., issuing and evaluating RFPs, or entering into contracts with local government agencies. (See JA 585.) The preliminary injunction only bars the City from "contracting" with private entities and "laying off City of Costa Mesa employees" as a result. (*Id.*) Moreover, the trial court made clear the intended limited nature of the injunction: "[A]s far as the City's ability to explore other avenues of . . . fiscal soundness, I do not think that this injunction extends to preventing the City from doing that as long as they do not terminate folks without following the proper [i.e., lawful] procedures." (JA 537:10-14.)

In any event, our courts routinely enjoin legislative action, particularly when not doing so would cause great harm to the party seeking an injunction and/or the legislative body is acting beyond its powers. (E.g.,

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[5] To the extent resolution of this new issue depends on development of the factual record beyond what was presented to the trial court during the preliminary injunction briefing, CMCEA would be prejudiced if this Court reversed the preliminary injunction without affording it an opportunity to more fully develop the factual record below. (E.g., *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1228.)

*Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 357 ["Code of Civil Procedure section 526 has no application" when an injunction merely "restrains action which will be unlawful"] [affirming injunction]; *California-Nevada Annual Conference of United Methodist Church v. City and County of San Francisco* (2009) 173 Cal.App.4th 1559, 1569 ["If an agency is proceeding in a matter beyond its jurisdiction, judicial intervention may be obtained even though the agency has not yet reached a final decision . . . . [Citations] Relief may be obtained in such a case even if the unauthorized acts are considered legislative in nature"].)

And the City's case, *Johnston v. Board of Supervisors of Marin County* (1947) 31 Cal.2d 66 (cited at AOB p. 10), is distinguishable. There, the trial court issued its preliminary injunction *before* the board of supervisors enacted an ordinance. (*Id.* at p. 69 [injunction entered after board vote, but before a supervisor was able to exercise his right under parliamentary procedure to change his vote at the next meeting]; *id.* at p. 71 [injunction "was issued after action on the proposed ordinance was delayed by the [parliamentary] motion for reconsideration"].) That is, the court enjoined the board of supervisors from *completing* its exercise of legislative discretion. (*Id.* at p. 71 [the injunction "order[ed] the Board of Supervisors to refrain from either publishing the ordinance or taking any steps to bring such ordinance into effect"].) By contrast here, "the City Council [already] ***decided to contract*** 18 identified City services" (JA 95, 174), and the

injunction only temporarily prevents the *ultimate* act of contracting with private entities during the course of this litigation, which is set for trial on April 9, 2012.

And, unlike *Johnston*, the City of Costa Mesa has already acted to "enforce" its legislative decision by, e.g., issuing the termination notices to affected employees. (Compare 31 Cal.2d at p. 71 [presuming no injury from mere enactment of ordinance "without any attempt to enforce it"] with JA 95, 174 ["You are hereby notified that ***you will be subject to lay off*** effective . . . September 17, 2011 [or October 8, 2011]"] (emphases added).) The trial court correctly found the threatened layoffs on a date certain would likely cause more harm to plaintiffs than it would to the City.

### B. The City Failed to Show It Suffered *Any* Harm from the Preliminary Injunction When Entered or Now

The City fails to show how the preliminary injunction caused it any harm when it was entered, let alone any harm now. In fact, the City has never asked ***any*** court to stay the trial court's preliminary injunction. It did not file a motion to stay the injunction with the trial court. It did not file a petition for writ of supersedeas or any motion to stay when it filed its procedurally-defective petition for writ of mandate, and it has not done so in this appeal. (See Dockets in Case Nos. G045666 and G045730.)

The only "harm" the City points to is its generalized "interest in protecting its legislative discretion to carry out its public functions." (See

AOB at p. 37.) But, as demonstrated above, the preliminary injunction the trial court entered does just that by allowing the City to issue RFPs and evaluate responses, or enter into contracts with local government agencies. Moreover, the City's own termination notices clearly state that "the City Council ***decided to contract*** 18 identified City services" (JA 95, 174)—that is, it already exercised its discretion. As such, it is only the ultimate act of contracting with a private party that is enjoined.

Finally, the City vaguely asserts the "public interest" must be considered. (AOB at pp. 37-38.) But, as the City's own cited case confirms, that consideration only applies when a government entity is enjoined from *lawfully* exercising its powers. (See *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1472–1473.) The very issue before the trial court on the merits is whether the City may lawfully outsource city services. It did not err in finding at the preliminary injunction stage that it did not, especially given the great harm to City employees.

## V

## THE CITY FAILS TO SHOW THERE IS NO REASONABLE LIKELIHOOD CMCEA WILL PREVAIL ON THE MERITS

At the outset, CMCEA notes that, to affirm the trial court's order, this Court need not definitively decide the existence or scope of the City's asserted authority to outsource city jobs. "[C]onsideration of

[likelihood of success on the merits] does not entail final adjudication of the ultimate rights in controversy." (*King v. Meese* (1987) 43 Cal.3d 1217, 1227); accord *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) In fact, based on the great harm to city employees and relative lack of harm to the City, this Court could affirm the preliminary injunction based on irreparable harm alone. (See *King, supra,* 43 Cal.3d at p. 1227.)

The City repeatedly mischaracterizes the findings necessary to affirm the trial court's order and never makes a "clear showing" the trial court abused its discretion. Contrary to the City's arguments, by its very nature a *preliminary* injunction is not a full adjudication on the merits. For that reason, a reviewing court does not "decide, as on appeal from a final judgment, whether plaintiffs were entitled to the relief they received." (*Butt, supra*, 4 Cal.4th at p. 678, n.8.) Instead, "[t]he abuse-of-discretion

standard acknowledges that the propriety of preliminary relief turns upon difficult estimates and predictions . . . ." (*Id.*)[6]

This requirement is not onerous. As our Supreme Court stated, a "trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is *some* possibility that the plaintiff would ultimately prevail on the merits of the claim." (*Butt, supra*, 4 Cal.4th at p. 678; see also *Robbins, supra,* 38 Cal.3d at p. 206 ["reasonable probability" of success on the merits is sufficient].)

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[6] This is particularly true for the City's argument the evidence did not support the preliminary injunction under Government Code sections 37103 and 53060. (AOB at pp. 33-36 [arguing "it is impossible to discern, at this stage" whether outsourced services were special services because that is "a question of fact"].) CMCEA was not required at the preliminary injunction stage to *conclusively* prove the outsourced jobs were not "special services," especially when the identified services did not *clearly* fall into recognized "special services" categories under the case law. (See, e.g., JA 84, 224 and 85 Ops.Cal.Atty.Gen. 83 [listing examples of special services]; cf. *Irwin, supra*, 65 Cal.2d at pp. 20-21 ["any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation'"].) And the fact that those services have always been performed by civil servants is certainly strong evidence that they are not "special" within the meaning of those statutes. (*Jaynes v. Stockton* (1961) 193 Cal.App.2d 47; *CSEA v. Del Norte County Unif. School Dist.* (1992) 2 Cal.App.4th 1396; JA 92, 232-233, 250-251, 270-271, 323-324, 344-345, 386-387, 417-418 [employee declarations attesting that outsourced jobs not "special services" and currently performed by city employees].) The City offered no contrary evidence.

### A. CMCEA Is Reasonably Likely to Succeed on Its Claim That the City Has No Authority to Outsource the City Services Performed by CMCEA Members to Private Entities Under the Government Code

#### 1. The City Forfeited Its New Arguments Because It Failed to Present Them to the Trial Court

In its Opening Brief, the City raises a number of new arguments regarding its purported general authority to outsource city jobs. (See, e.g., AOB at pp. 18-22 [asserting for the first time purported "constitutional" and "statutory" authority to outsource], 22-29 [asserting for the first time that "special services" statutes merely codify a general law city's existing powers rather than limit them], 29-33 [distinguishing CMCEA's authorities for the first time on numerous grounds].) Yet, despite filing two opposition briefs, the City never meaningfully presented *any* of these arguments to the trial court. Instead it opposed the injunction based on unsupported and vague assertions that it was entitled to provide city services in a fiscally responsible manner and the trial court "cannot enjoin the thought process" of the City. (JA 161:8-9 [opposition to ex parte]; JA 465, 467:9-12; 469:2-3 [opposition to supplemental brief].)[7] The City's new arguments are, thus, waived because the trial court was not able to consider them in granting the

[7] The City did also argued that Government Code section 54981 allowed it to contract with public entities (e.g., JA 167-168), which is the reason the trial court enjoined it from contracting with private entities only. (See JA 585.)

preliminary injunction. (*JRS Products, supra,* 115 Cal.App.4th at p. 178.) Accordingly, to avoid any prejudice to CMCEA, to the extent these new arguments depend on further development of the factual record, they should be assessed, if at all, after full adjudication on the merits below.

Regardless, the City's new arguments fail on the merits because they are premised on an overbroad theory of a general law city's powers that has no support.

### 2. As a General Law City, Costa Mesa Only Has Those Powers Affirmatively Granted by Statute

The City of Costa Mesa is a general law city. (JA 2; *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 333.) "A general law city has only those powers ***expressly*** conferred upon it by the Legislature, together with such powers as are '***necessarily incident*** to those expressly granted or essential to the declared object and purposes of the municipal corporation.' The powers of such a city are ***strictly construed***, so that '*any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation.*'" (*Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13, 20-21 [quoting *Hurst v. City of Burlingame* (1938) 207 Cal. 134, 138] [emphases added].) Incidental powers must be "essential to the declared objects and purposes of the corporation—*not simply convenient, but indispensable.*" (*Tax Factors v. County of Marin* (1937) 20 Cal.App.2d 79, 87-88 [italics original].)

A general law city thus "must comply with state statutes that specify requirements for entering into contracts." (*G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1092.) "A contract entered into by a local government without legal authority is 'wholly void,' ultra vires, and unenforceable." (*Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 783 [quoting *Dynamic Ind. Co. v. City of Long Beach* (1958) 159 Cal.App.2d 294, 299-300].) Moreover, a court may enjoin private contracting that would exceed a public entity's statutory grant of power. (See, e.g., *California School Emp. Ass'n v. Willits Unified School Dist. of Mendocino County* (1966) 243 Cal.App.2d 776, 781-784 and 788 [injunction issued where "School district board[] ha[d] power to contract only as provided by statute" and such authority did not exist allowing private contracting for janitorial services].)

The City ignores these core principles and limitations on the powers of general law cities and tries to shift the analysis by arguing it purportedly has "broad discretionary power" under the California Constitution and Government Code section 37112 to outsource city services. (AOB at pp. 18-20.) The City is incorrect. The California Constitution specifically ***limits*** the laws a general law city can enact to those that are "not in conflict with general laws." (Cal. Const., art. XI, § 7.) And as explained below (Part V.A.3, *infra*), the City's outsourcing *directly* conflicts with Government Code sections 37103 and 53060 because the

services at issue are not "special services." Moreover, if general law cities had the plenary authority the City advances here, it would erode a key distinction between the powers that general law cities and charter cities have.[8]

The City's cited cases on general contracting powers do not help it. First, *Morrison* and *Carruth* articulated a general law city's power to contract in broad language because they dealt with situations where a city sought to avoid enforcement of contractual obligations it incurred. (See *Morrison Homes Corp. v. City of Pleasanton* (1976) 58 Cal.App.3d 724, 733-734 [city sought to avoid enforcement of annexation agreements]; *Carruth v. City of Madera* (1965) 233 Cal.App.2d 688, 695 [same].) In *Morrison*, the Court was merely called upon to determine whether a general law city had authority to enter into annexation agreements with a developer whereby *the city itself committed* to provide sewer connections for homes built on the annexed tracts. (58 Cal.App.3d at p. 733.) And *Carruth* involved a lawsuit challenging a city's refusal to install water mains, build

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[8] Unlike general law cities, charter cities have the "constitutional authority to regulate matters that are deemed municipal affairs despite the existence of state law governing the same subject matter." (*Amaral, supra,* 163 Cal.App.4th at 1175 n.7; see also *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 539 [a charter city's "ordinances relating to matters which are purely 'municipal affairs' are not invalid because they are in conflict with general state laws or because state laws have been enacted to cover the same subject"].)

sewers, and pave the streets on annexed land, as *it had committed* to do by contract. (233 Cal.App.2d at p. 691.) In neither case did the court consider or address the city's ability to "contract out" municipal services, and there was certainly no discussion of Sections 37103 and 53060.

*Tax Factors v. County of Marin* (1937) 20 Cal.App.3d 79, 84-85 also involves a public entity seeking to avoid enforcement of contract (for services duplicating those of the county assessor), but it did not directly address the authority of a general law city to outsource its services. In fact, it actually *rejected* the broad theory of municipal authority advanced here by the City. (See *id.* at p. 87-88 [general law city only has those powers "essential to the declared objects and purposes of the [municipal] corporation—*not simply convenient, but indispensable*"] [italics original, internal citations and quotations omitted].) The City nowhere argues that contracting with private entities to perform city functions is "essential . . . to the object and purposes" of the City. Nor could it, especially when those functions are *already performed* by City employees.

Indeed, the City artfully attempts to obscure the distinction between general law cities (which have limited powers) and charter cities (which have broad powers over municipal affairs). For example, *Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157, 1175 (cited at AOB at p. 19) does not even involve a general law city at all, but rather discusses the contracting powers of a *charter* city. The same is true of *City and County*

*of San Francisco v. Boyd* (1941) 17 Cal.2d 606, 617. Unlike a charter city, Costa Mesa only has those powers expressly granted to it or essential—"*not simply convenient, but indispensable*"—to the purposes of a municipal corporation. (*Tax Factors, supra,* 20 Cal.App.3d at pp. 87-88 [italics original].) Accordingly, the City's unsupported assertion that "a general law city may contract in the private sector for services, including those being performed by its classified workers[,]" so long as no law mandates that service be performed by city employees (AOB at p. 19), simply misses the mark. No statute affirmatively grants the City any authority to outsource city jobs to private entities in the first place.

Government Code section 37112 does not provide that authority. It is merely an enabling statute that allows Costa Mesa to enact those ordinances "necessary or proper to carry out the provisions of *this title*"—i.e., to carry out those powers *already* granted by the Legislature. (See Gov. Code section 37112 ("Complementary Powers") [italics added].) That is because "this title" refers to "Title 4. Government of Cities." (See Gov. Code section 34000, *et seq.*) And the City cannot possibly show that private contracting is either necessary (because it has always utilized civil servants) or proper (because of the prohibition of Government Code sections 37103 and 53060) to providing the services at issue here. Thus, it is not surprising that no case has interpreted Government Code section 37112 as a plenary grant of authority in the manner the City advances.

Instead it relies on an Attorney General opinion letter regarding a city's ability to contract with a private entity to operate a "misdemeanor pre-arraignment detention facility." (AOB at p. 20 [74 Ops.Cal.Atty.Gen 109 (1991)].) But that opinion letter does not answer the question here. First, that opinion relied on provisions of the Penal Code that expressly allowed certain penal functions to be contracted to private entities and, thus, has no application in this case. Second, its analysis is contingent on "*the absence of* ***any*** *law* which would prohibit a city from establishing a private detention facility." (74 Ops.Cal.Atty.Gen 109 at *2 [further noting "the law in no way dictates how that jail shall be established or administered"]; see also fn.1 [expressly declining to address whether "any administrative duties . . . would require the [presence] of duly authorized peace officers"].) And the opinion letter did not mention, let alone analyze, Government Code sections 37103 and 53060, which prohibit the type of contracting at issue in this case.

The City also latches onto a second set of cases that do not involve general law cities at all. Instead, those cases involve local educational institutions operating under the so-called "permissive" Education Code provisions which—*unlike* the Government Code—give such institutions plenary authority in a manner analogous to a charter city. As the court in *SEIU v. Board of Trustees of the West Valley/Mission Comm. College Dist.* (1996) 47 Cal.App.4th 1661, 1665-1666 explained,

the Legislature amended the Education Code in 1981 with the intent that community colleges have plenary discretion over their affairs without the need for express statutory grants of power. Specifically, it was "*the intent of the Legislature that the community college district governing board shall have the power, **in the absence of other legislation**, to so act under the general authority of*" Education Code section 70902. (*Id.* at p. 1666 [internal citations and quotations omitted; italics original and bold added].)[9] That is, "the permissive [Education] [C]ode allows a district's governing board to act under its general authority without specific statutory authorization." (*Id.*) That is a far cry from the powers allocated to a general law city like Costa Mesa. (See Part V.A.2, *supra.*)

*California School Employees Association v. Kern Community College Dist. Board of Trustees* ("*CSEA*") (1996) 41 Cal.App.4th 1003 is similarly distinguishable. As in *SEIU*, the *CSEA* court relied on plenary authority granted by the Education Code, allowing a school district to "undertake any activity which is not in conflict with, inconsistent with or preempted by any law and which does not conflict with the purposes for

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[9] Notably, Education Code § 70902 does not limit a district's powers to those already granted elsewhere in the Education Code—unlike Government Code 37112, which enables general law cities to enact ordinances only in so far as they relate to those powers *already* granted. Additionally, the Legislature's revisions to the Education Code gave districts authority to "contract for ... goods and services." (47 Cal.App.4th at p. 1666.)

which school districts are enacted." (*Id.* at p. 1013.) Again a general law city has no such plenary authority.

In this light, *SEIU* and *CSEA* do not support the City's position that a general law city may—like a community college district—freely contract out city services *unless* directly prohibited by statute. (AOB at pp. 20-22.) Instead, these cases must be understood as a product of those local agencies' broad powers under the permissive Education Code. *SEIU* thus found the community college there lawfully contracted with Barnes & Noble to operate a bookstore, even though "no section of the Education Code specifically . . . authorizes" it. (47 Cal.App.4th at p. 1667.)[10] And *CSEA* thus found a community college could subcontract grounds keeping services because "the subcontracting at issue is not prohibited or preempted by other sections of the Education Code" that apply to "non-merit" districts. (41 Cal.App.4th at p. 1013.)[11]

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[10] The *SEIU* court also found compliance with Section 53060 because the District's contract with Barnes & Nobles provided the District with "management expertise, technological support and profits which respondent could not match through the use of classified personnel"—i.e., "special services." (*Id.* at pp. 1673-1674.)

[11] Similarly, 93 Ops.Cal.Atty.Gen 63 (2010) (cited at AOB p. 22 fn.3) also depends on the permissive Education Code. (See 93 Ops.Cal.Atty.Gen 63 at *3 ["the Education Code is a permissive body of law, and . . . it is not necessary to find express [statutory] authority" outsourcing at-risk student programming].)

### 3. Government Code Sections 37103 and 53060 Prohibit Outsourcing Under the Circumstances of This Case

Because a "general law city has only those powers expressly conferred upon it by the Legislature" and those powers "are strictly construed," it follows that, unless the Legislature affirmatively granted general law cities the power to contract with private entities to provide city services, they have no such power. (*Irwin, supra,* 65 Cal.2d at pp. 20-21.)[12] The City cites no statute expressly giving it the power it asserts here.[13] There is none.

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[12] The City nowhere argues its asserted contracting powers arise from the other two categories identified in *Irwin*, i.e., that they are "are 'necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation.'" (*Id.*) Nor could it in light of the fact that the services at issue have always been performed by civil servants represented by CMCEA. (E.g., *Jaynes, supra,* 193 Cal.App.2d 47; *CSEA, supra,* 2 Cal.App.4th 1396.)

[13] As noted above, the only statute the City does cite (Government Code 37112), merely authorizes it to implement those powers the Legislature already gave it, and only in manners both "necessary and proper."

Accordingly, Government Code Sections 37103 and 53060 are the only relevant statutes in which the Legislature authorizes a general law city to contract with private entities for provision of city services. And by their plain terms those statutes limit such contracting to "special services."[14] That is, unless the service the City seeks to outsource is a "special service" under the statute, the City may not lawfully contract with a private entity for that service. (See, e.g., *Jaynes v. Stockton* (1961) 193 Cal.App.2d 47 [legal services are not special services under § 53060 where county counsel could perform such services]; *CSEA v. Del Norte County Unif. School Dist.* (1992) 2 Cal.App.4th 1396 [maintenance and custodial services not special services]; see also 85 Ops.Cal.Atty.Gen 83 (2002) [general law city may not outsource issuance of parking citations to private entity because they

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[14] Government Code section 37103 provides, in relevant part:

> The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal, or administrative matters.

Government Code section 53060 provides, in relevant part:

> The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.

(emphases added.)

are not special services; further noting "*it is for the Legislature to determine whether a [general law] city should be allowed to use private employees to issue parking citations*"] [italics added].)

The Attorney General squarely addressed the limited powers of general law counties in 76 Ops.Cal.Atty.Gen 86 (1993). There, the Attorney General determined that, "[w]ithout statutory authority, a general law county may ***not*** contract with [private] persons to provide the same level of services, but at less expense, than presently performed by its civil service employees." (Emphasis added.) The Attorney General understood that, because of the nature of the limited powers of general law counties, they had no such authority to contract because "[n]othing in the . . . statutes suggests a county may contract for services without regard to the 'special services' limitation, solely on the basis of cost savings." (*Id.* at *3.) Specifically, because "in the Legislature's grant of a particular power, there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the prescribed mode" (*id.* [quoting *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 196]), general law cities and counties have no authority to contract with private parties beyond that affirmatively granted in the general laws.

### a. The Special Services Statutes Do Not "Codify" Any Pre-Existing Powers as to General Law Cities, But Instead Affirmatively Grant Them

Accordingly, the City's argument that the special services statutes "do nothing more than codify the power of general law cities" is flatly wrong, because it fundamentally misconstrues the power of general law cities. (AOB at p. 23.) Government Code sections 37103 and 53060 are affirmative grants of power from the Legislature to general law cities authorizing them to contract with private entities for special services; without these express grants of statutory authority, general law cities would not have these powers. As the City's own cases confirm, Government Code sections 37103 and 53060 effectively gave general law cities (among others) powers that charter cities *already* had. (Cf. *Boyd, supra,* 17 Cal.2d at pp. 616-617, 620 [recognizing charter authority to contract for special services with private entities] and *Adams v. Ziegler* (1937) 22 Cal.App.2d 135, 138 [accord] [cited at AOB at pp. 24-25].) That is, there would be no need to codify *Boyd* and *Adams* in the Government Code, because charter cities are already presumed to have all powers not expressly denied to them. But that was not true for all other local government entities. The City's argument would turn the Legislature's enactment of Government Code sections 37103 and 53060 into an idle act. (*Shoemaker v. Myers*

(1990) 52 Cal.3d 1, 22 [courts do not "presume that the Legislature performs idle acts"].)

The City's argument that these statutes were purportedly enacted as exceptions to competitive bidding requirements is a red herring. (See AOB at p. 25 [citing *Cobb v. Pasadena City Bd. of Ed.* (1955) 134 Cal.App.2d 93, 95-96].) The court in *Cobb* merely held that the public entity there did not have to comply with the Education Code's competitive bidding requirement before contracting with an architect for his services. (134 Cal.App.2d at p. 95.) It based this conclusion, in part, on the second paragraph of Section 53060, which allowed "[t]he legislative body of the corporation or district [to] pay from any available funds such compensation to such persons as it deems proper for the services rendered." (*Id.* at p. 96.) But it does not logically or legally follow from the mere fact that Section 53060 was held to have the *effect* of exempting certain contracting from competitive bidding that the *sole purpose* of the statute was to achieve that result. Regardless, what matters in this case is whether *any* statute gives Costa Mesa the power it asserts to enter into contracts with private entities to provide city services; none does, and the only statutes allowing contracting with private parties expressly *limit* such contracting to special services.

For that reason, the City's corollary argument that Government Code sections 37103 and 53060 "do not restrict, forbid or impliedly repeal

the other powers Costa Mesa . . . holds under the Constitution, the Government, and its MOU" (AOB at p. 25 [emphases omitted]), is also incorrect. As demonstrated herein, not one amongst the Constitution, the Government Code, or the MOU give the City the power it asserts here. Thus, it does not matter that Government Code sections 37103 and 53060 do not expressly "state[] that a local agency may only contract out to private entities for special or 'expert' services" (AOB at p. 25-27) because, as to general law cities, it is well-established that in these affirmative grants of power "there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the prescribed mode." (76 Ops.Cal.Atty.Gen 86 at *3 [quoting *Wildlife Alive, supra,* 18 Cal.3d at p. 196].)

The City's arguments do not change the fundamental structure and nature of a general law city's limited powers. (*Irwin, supra,* 65 Cal.2d at pp. 20-21 ["A general law city has only those powers ***expressly*** conferred upon it by the Legislature" and "[t]he powers of such a city are ***strictly construed***"] [emphases added].) The purported "wall of precedent" the City relies on (AOB at p. 26) does not support its argument and says

*nothing* about a general law city's power to contract with private entities for performance of city jobs in the absence of express statutory authorization.[15]

Finally, the City unpersuasively distinguishes CMCEA's authorities. First, contrary to the City's arguments, *CSEA v. Sunnyvale Elementary School Dist.* (1973) 36 Cal.App.3d 46 ("*Sunnyvale*") and 76 Ops.Cal.Atty.Gen 86 are in principle indistinguishable from the case at bar. In *Sunnyvale*, the court correctly held the school district was limited to those contracting powers expressly granted by the Legislature, i.e., Section 53060, which did not affirmatively include the power to contract non-special services with a private entity. (36 Cal.App.3d at p. 60.) The

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[15] The City also argues the legislative history of Section 53060 supports its view. (AOB pp. 27-29.) But there is no ambiguity in Section 53060 requiring legislative history analysis. (*People v. Cochran* (2002) 28 Cal.4th 396, 400–401 ["If there is no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said, and we need not resort to legislative history to determine the statute's true meaning"].) Moreover, the inter-department memo the City relies on does not help it but instead confirms the limited nature of municipal powers. (See CMCEA's MJN Ex. A.) First, it recognized that local governments' contracting powers for "technical experts" derives from "express or necessarily implied grants of powers." It further recognized that power is also present when "*necessary* to the performance of their functions." [Italics added.] Finally, it recognizes that Section 53060 was not a sweeping grant of power because, as to counties, "this office has not regarded the equivalent language of Government Code section 31000 as a carte blanche for the hiring of services without regard to the purpose to be served thereby (Atty. Gen's Opin. 51/10, Apr. 26, 1951)." (*Id.*; see also CMCEA MJN Ex. B [Atty. Gen's Opin. 51/10 ["we must still find that the power sought to be exercised is reasonably necessary to the performance of duties expressly conferred"].)

Attorney General reasoned similarly as to general law counties in 76 Ops.Cal.Atty.Gen 86. The City argues these authorities do not consider "general grant[s] of authority" applicable to general law cities, such as "the Constitution and Section 37112." (AOB at pp. 31-32.) But, as detailed *supra*, neither of these expressly or otherwise *affirmatively* authorizes the City to do what it seeks to do here. And no court has found that such authority exists outside the limited scope of Sections 37103 and 53060.

Second, the City attempts to distinguish *CSEA v. Del Norte County Unified School Dist., supra,* 2 Cal.App.4th 1396, *Jaynes v. Stockton* (1961) 193 Cal.App.2d 47, and 85 Ops.Cal.Atty.Gen 83 because, according to the City, those authorities involved affirmative mandates that the services at issue be performed by a government employee. (AOB at pp. 29-30.) That selective reading mischaracterizes those authorities. While the *Del Norte* court recognized that the district's merit system restricted hiring outside the classified service, it did so exactly because the services sought to be outsourced fell *outside* of the district's limited powers to contract with private entities, e.g., Section 53060. (See 2 Cal.App.4th at p. 1404 ["Regular supervisors are not professional experts, whatever skills ServiceMaster's personnel may bring to the job"].)

Similarly, the *Jaynes* court held that the outsourcing of legal services was unlawful because those services were not "special services," since county counsel could perform them, but it did not base that holding

merely on the fact that the county counsel was required to do so by the applicable statutes. (See 193 Cal.App.2d at pp. 51-52.)[16]

And 85 Ops.Cal.Atty.Gen 83 found that issuing parking citations was not a "special service," not only because the Vehicle Code required ticketing by peace officers, but because "[w]e see nothing 'special' in issuing parking citations[,]" since "[s]ervices may be special because of the outstanding skill or expertise of the person furnishing them." (85 Ops.Cal.Atty.Gen 83 at *2-3.)

In any event, while the existence of a statutorily-required duty may further limit a general law city, in addition to the limitations contained in the *special services statutes*, that has nothing to do with cases such as this one, where the issue is whether a general law city has the power to contract with private entities outside the special services statutes. The trial court thus did not abuse its discretion in finding the City had no such authority.

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[16] The City also misstates the holding of *Montgomery v. Sup. Ct.* (1975) 46 Cal.App.3d 657. That case did *not* find that "the fact that there were city employees that could have served the role of prosecutor did not prevent the city from contracting out . . . under Section 53060." (AOB at p. 30 n.8.) Instead, that court found the outsourced were "special" exactly because no other city employee could fulfill that job. (See 46 Cal.App.3d at p. 669 ["his services are 'special' because no one else in the employ of the city is 'qualified' to perform them"] [citations omitted].) That is a far cry from this case where the services sought to be outsourced *are* fulfilled by city employees.

### B. CMCEA Is Reasonably Likely to Succeed on Its Claim That Outsourcing City Jobs to Private Entities Violates the MOU

To the extent this Court affirms the preliminary injunction, because the trial court did not abuse its discretion in finding it was reasonably likely the City had no authority to outsource to private entities under the Government Code, it need not separately consider the question of whether the MOU also prohibits outsourcing. (See JA 585 [issuing injunction for violation of Government Code only].)

Contrary to the City's assertions, the trial court did not rule on or otherwise reject CMCEA's MOU claims when it granted the injunction based on the Government Code. (See JA 585 [preliminary injunction]; JA 530-538 [reporter's transcript].) Furthermore, the MOU cannot, as the City argues, affirmatively grant the City the authority to outsource that the Legislature denied to it. (See AOB at p. 12 [arguing "*the MOU authorizes* Costa Mesa to contract for services performed by employees covered by the MOU with either public or private entities"]; *id.* at p. 17 [arguing preliminary injunction "restrains Costa Mesa from exercising *rights it holds under its MOU*"] [italics added].) That is, the parties' contractual agreement could not have imbued the City with any authority withheld by the Legislature. (*Irwin, supra,* 65 Cal.2d at pp. 20-21; cf., e.g., *State Personnel Board v. Department of Personnel Administration* (2005) 37 Cal.4th 512 [MOU could not strip constitutional authority over employee

discipline away from state agency].) What is more, the MOU must be construed with the background law regarding the limited powers of general law cities. Thus, to the extent the MOU allows outsourcing at all (and it does not), it is only with public entities.

### 1. The City's Threatened Outsourcing Breached the MOU

MOU section 14.1 outlines the MOU's general policy of establishing a "collective process of sharing information" relating to the cost of city services, because the "City is interested in involving [CMCEA] to the greatest degree" in any decision to outsource city jobs. (JA 121.) Specifically, the City "agrees to make [CMCEA] part of discussions regarding the contracting of services." (*Id.*) Section 14.2 further provides that, "should a decision be made to contract out," rather than indiscriminately laying off CMCEA members, "the City will make every effort to transfer and utilize regular attrition in making the necessary adjustments." (*Id.*) And Section 19.2(B) provides that "[i]n the event a decision is made by the City to contract out . . . . [t]he City shall meet and consult with CMCEA on such matters as the timing of the layoff and the number and identity of" affected employees. (JA 122).

The evidence before the trial court was that, although the City purported to abide by the third contractual duty, it steadfastly refused to consult with CMCEA over the decision to outsource itself. (See, e.g., JA

172 ¶ 10 [City would only "meet and confer . . . about the *impact* of any contracting out"] [italics added]; JA 214 [same and further asserting "there is no MOU prohibition against contracting out during the term of the MOU"].) But that refusal violated the City's contractual duties under Sections 14.1 and 14.2 to have CMCEA be part of the City's decision to outsource city jobs. (See JA 121-122.) Moreover, the City's blanket termination notices also violated its duty under Section 14.2 to implement its outsourcing layoffs through "transfer[s]" and "regular attrition." (JA 122.) Although it did not do so, on these facts, the trial court would have been entitled to enjoin the City's breach of the MOU. (See *SCLC, supra,* 230 Cal.App.3d at p. 224.)

### 2. The MOU Does Not Affirmatively Grant the City Authority to Outsource City Jobs to Any Entity

The MOU does not affirmatively authorize outsourcing of city jobs. (See JA 121-122 [MOU sections 14.1 (expressing a "policy" of involving CMCEA in "discussions regarding the contracting [of] services"), section 14.2 ("minimum of six month notice" to affected employee "should a decision be made to contract out"), and section 19.2(B) (same and further imposing duty to meet and confer over "timing . . . number and identity of the employees" to be laid off)].) As even the City concedes, its "authority to contract out under the MOU does not *arise from* Section 14.2." (AOB at p. 14 [italics added].) Instead, the City correctly

notes that the MOU merely sets the City's *contractual obligations* to CMCEA members should the City exercise whatever limited power it may have to do so. (See, e.g., *id.* at pp. 14-15.) And to the extent the City does not proceed as provided in the MOU (e.g., by not "involving [CMCEA] to the greatest degree" or not "making [CMCEA] part of discussions regarding the contracting" (JA 121); or by contracting with private entities) the City ***breaches*** that agreement.

Yet, according to the City, MOU sections 14.1, 14.2, and 19.2(B) would be rendered "meaningless" if they prevented outsourcing because, according to the City, "the parties contemplated that Costa Mesa could contract out services being performed by CMCEA's members." (AOB at pp. 12-14.) The City, however, offered *no evidence* before the trial court, and certainly none in its Opening Brief, that the parties *intended* to allow outsourcing under these or any sections. (See, e.g., JA 170-172.)

Moreover, contractual terms are interpreted and harmonized within the scope of existing law (*Swenson v. File* (1970) 3 Cal.3d 389, 393 ["all applicable laws in existence when an agreement is made . . . necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated"]), and the law is clear that the City may not outsource city jobs to private entities. That means that to the extent these MOU

provisions contemplate outsourcing, they can only be reasonably construed as contemplating outsourcing to *public* entities.

## VI

## CONCLUSION

Because the City notified its workers they would be fired on a date certain due to its decision to outsource their jobs, the trial court did not abuse its discretion by entering a preliminary injunction preserving the *status quo*, particularly given the meager showing by the City of interim harm and affirmative authority to outsource to private entities. The City has failed to carry its burden on appeal of showing the trial court committed clear error on this finding, and it certainly did not show that CMCEA is unlikely to succeed on the merits of its claims.

For all these reason, this Court should affirm the preliminary injunction, so City employees may remain secure in their positions until, approximately six weeks from now, the trial court has determined whether Costa Mesa has the power to outsource that it asserts.

Dated: February 23, 2012

CARROLL, BURDICK & McDONOUGH LLP

By _____

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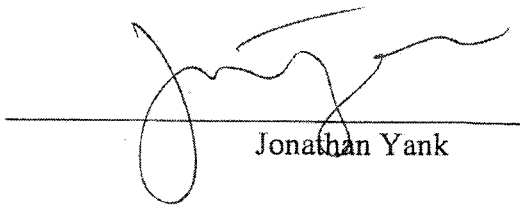
## CERTIFICATION RE: WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that this brief contains 10,198 words, as determined by the computer program used to prepare the brief.

Dated: February 23, 2012



Jonathan Yank

***Costa Mesa City Employees' Association v. City of Costa Mesa, et al.***
**California Court of Appeal – Fourth Appellate District, Division Three, No. G045730**

**PROOF OF SERVICE BY UNITED PARCEL SERVICE (UPS) – NEXT DAY**

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On February 23, 2012, I served the enclosed:

**RESPONDENT'S BRIEF**

on the parties in said cause (listed below) by enclosing a true copy thereof in a prepaid sealed package, addressed with appropriate United Parcel Service shipment label and, following ordinary business practices, said package was placed for collection (in the offices of Carroll, Burdick & McDonough LLP) in the appropriate place for items to be collected and delivered to a facility regularly maintained by United Parcel Service. I am readily familiar with the Firm's practice for collection and processing of items for overnight delivery with United Parcel Service and that said package was delivered to United Parcel Service in the ordinary course of business on the same day.

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on February 23, 2012, at San Francisco, California.

Janine Oliker

CBM-SF\SF535261.3